IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTIONS DOCKETED AS 239, 240, 241, 242, 243

Defendant has filed a number of motions (docket numbers 239, 240, 241, 242, 243) making various demands. For the reasons set forth herein, as well as prior submission by the United States, all of these motions should be summarily denied.

Docket # 239

In this motion, the defendant asks the Court to compel the CIA to certify the nature and content of information it gave to the FBI regarding the defendant. As part of this motion, the defendant appears to assert that he made two telephone calls from Kandahar to Azerbaijan, and, based on this, appears to believe that the CIA must have passed on information about him to the FBI before he entered the United States. The defendant also repeats a demand he made earlier regarding a search of an address where the defendant claims to have lived in London that he asserts was searched by British authorities in connection with the bombings of the American embassies in Kenya and Tanzania. Finally, the defendant demands that the CIA disclose information it gave to the FBI before September 11 about himself, the 19 hijackers, and "the German cell."

In considering any discovery request, the Court should first look to the materiality of the requested information to the preparation of the defendant's defense. *See United States v.*

Maniktala, 934 F.2d 25, 28 (2d Cir. 1991). "Under Rule 16, the defendant cannot rely on conclusory allegations or on a general description of the requested information, but must make a prima facie showing of materiality to obtain the requested information." *United States v. King*, 928 F. Supp. 1059, 1061 (D. Kan. 1996). "Materiality, of course, must be assessed against the backdrop of all the evidence presented to the jury." *Maniktala*, 934 F.2d at 28. Indeed, "[m]ateriality means more than that the evidence in question bears some abstract logical relationship to the issues in the case." *Id.* (quoting *United States v. Ross*, 511 F.2d 757, 762 (5th Cir. 1975)). "There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor." *Id.* (quoting *Ross*, 511 F.2d at 763). Finally, "[t]he burden is with the defendant to prove the materiality of the requested, undisclosed information." *King*, 928 F. Supp. at 1062.

Even if a defendant makes a threshold showing of materiality, however, the inquiry is not complete. "As the burden of the proposed [file] examination [triggered by the discovery request] rises, clearly the likelihood of a pay-off must also rise before the government can be put to the effort." *United States v. Brooks*, 966 F.2d 1500, 1504 (D.C. Cir. 1992). *See also United States v. George*, 786 F. Supp. 56, 58 (D.D.C. 1992) ("Materiality is, to some degree, a sliding scale; when the requested documents are only tangentially relevant, the court may consider other factors, such as the burden on the government that production would entail or the national security interests at stake, in deciding the issue of materiality."). "It may also be relevant that the defendant can obtain the desired information from other sources." *Id. See also Ross*, 511 F.2d at 763 ("the availability of the disputed material from other sources, including the defendant's own

knowledge, must also be considered"). Finally, the national security impact of the discovery request is another pertinent consideration. *King*, 928 F. Supp. at 1062 n.2.

Moreover, contrary to the implicit assumption of the defendant, the prosecution is not required to conduct a scorched earth search throughout the files of every agency in the United States Government. Rather, the Supreme Court has instructed that the prosecutor's obligation extends to agencies "*acting on the government's behalf in the case, including the police*." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added). Thus, most circuits have rejected the "monolithic" approach to the government under *Brady* that aligns every agency with the prosecution and requires the prosecutor to pursue a virtually impossible fishing expedition. *See Mastracchio v. Vose*, 274 F.3d 590, 599 (1st Cir. 2001) ("[K]nowledge of information beneficial to the defendant should be imputed to the prosecutor whenever such knowledge is possessed by a representative of the prosecution"); *Smith v. Holtz*, 210 F.3d 186, 195 (3rd Cir. 2000) (quoting *Kyles* for the proposition that the prosecutor has a duty to learn of evidence known to others acting on behalf of the government in the case); *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (quoting *United States v. Gambino*, 835 F. Supp. 74, 95 (E.D.N.Y. 1993) *aff'd*, 59 F.3d 353 (2d Cir. 1995)) ("Knowledge on the part of person employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt 'a monolithic view of government' that would condemn the prosecution of criminal cases to a state of paralysis."); *United States v. Flores-Mireles*, 112 F.3d 337, 340 (8th Cir. 1997) (*Brady* does not require disclosure of information "over which the prosecutor has no actual or constructive

control."); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) (no "duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue,"); *Smith v. Secretary of New Mexico Dep't of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) (*Brady* duty extends to "other arms of the state," but only to those "involved in investigative aspects of a particular criminal venture"); *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) (the prosecutor's constructive knowledge of material evidence extends only to "federal agenc[ies] participating in the same investigation of the defendant,"); *see also Odle v. Calderon*, 65 F. Supp.2d 1065, 1071-72 (N.D. Cal. 1999) (duty of prosecutor to search and disclose *Brady* material "does not extend to all agencies of the same government," but rather is limited to agencies involved in the investigation or prosecution of the defendant). *But see, e.g., Love v. Johnson*, 57 F.3d 1305, 1314 (4th Cir. 1995) ("The '*Brady*' right, as recognized and implemented in *Ritchie*, is not limited to information in the actual possession of the prosecutor and certainly extends to any in the possession of state agencies subject to judicial control"); *United States v. McVeigh*, 954 F. Supp. 1441, 1450 (D. Colo. 1997) (*Brady* requires prosecutors to inform themselves about everything that is known, in any government agency, that could assist in the construction of alternative scenarios); *United States v. Gonzalez*, 938 F. Supp. 1199, 1206 (D. Del. 1996) (no "distinction between different agencies in the same government for the purpose of [the *Brady* disclosure] inquiry").[1]

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[1] Despite the Fourth Circuit's broad language in *Love*, district courts within the Fourth Circuit have rejected application of the monolithic theory of the government under *Brady*. *See, e.g.*, *Horton v. United States*, 983 F. Supp. 650, 654 (E.D. Va. 1997) (Ellis, J.) ("But there is no duty on the prosecutor's office to learn of information possessed by other government

Given these legal principles, the defendant's motion should be swiftly rejected. As with many other discovery demands, the defendant fails to establish the relevance of the requested materials, or any good faith basis to believe they exist. For example, the defendant has not explained why he thinks he was the subject of the surveillance he seeks in his motion. As such, he is not entitled to the requested materials, or to require the Government to search for such materials.[2]

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agencies that have no involvement in the investigation or prosecution at issue. The prosecutor's constructive knowledge of material evidence extends only to 'federal agencies participating in the same investigation of the defendant.'").

[2] For example, the defendant gains nothing from the absence of incriminating evidence obtained during any surveillance of him or others involved in the charged conspiracies. *See United States v. Scarpa,* 897 F.2d 63, 70 (2d Cir. 1990) (affirming district court's refusal to require production of electronic surveillance of defendant: "A defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on specific occasions."); *United States v. Kennedy*, 819 F. Supp. 1510, 1519 (D. Colo. 1993) ("*Brady* requires the production of material information which is 'favorable to the accused,' that is, exculpatory information, not information which is merely, 'not inculpatory' and might therefore form the groundwork for some argument for the defendant."). Moreover, *Brady* requires the Government to disclose exculpatory information that is in its "sole" possession. *United States v. Abdel Rahman*, 870 F. Supp. 47, 51 (S.D.N.Y. 1994). Therefore, if the Government was aware of statements made by the defendant that are consistent with his defense, there is no obligation, under *Brady*, to provide them to the defendant. *See id.* at 53 ("To the extent it may be relevant, the underlying facts presumptively are known to Rahman; after all, it is his statement that is in question.").

Thus, even if there was electronic surveillance of the defendant during his two alleged calls from Kandahar to Azerbaijan, and even if that surveillance did not establish the defendant's guilt, there is no requirement under the law to disclose this fact, or the fruits of the surveillance, to the defendant. If, however, electronic surveillance of the defendant yielded evidence which was "expressly exculpatory," such as establishing the equivalent of an alibi for the defendant, then the Government would be required under Rule 16 and *Brady* to disclose the electronic surveillance to the defendant. In this case, the Government has complied with its *Brady* obligations and will continue to do so.

Nor is the defendant entitled to demand an answer to every interrogatory that tickles his curiosity. For example, the defendant should not be permitted to demand that the Government deny whether he or any of the hijackers, or their cohorts, were the subject of surveillance, by the American or any other government. If the American Government were conducting such surveillance, and if the fruits of such surveillance result in material to which the defendant was entitled under Rule 16 or *Brady*, then the Government will comply with its discovery obligations. Of course, this may include the Government seeking relief from the Court under Rule 16(d)(1) or the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, §§ 4 and 8. However, there is no basis in law for the defendant to have all of his questions answered, particularly in a case, such as this one, where there are substantial national security implications from the disclosure of intelligence, as well as the sources and methods used to collect such intelligence. For example, a statement by the United States Government about what the Government knew about the use of certain phones in Kandahar, or that the Government was not conducting surveillance of certain persons, may threaten national security by advertising to *al Qaeda* what the Government does not know, or what it may never be able to learn. *See Snepp v. United States*, 444 U.S. 507, 512 (1980) (per curiam) ("When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA – with its broader understanding of what may expose classified information and confidential sources – could have identified as harmful."); *United States v. Abdel Rahman*, 870 F. Supp. at 53 ("the prejudice to the government from disclosing its knowledge of this particular statement [by the defendant] would be substantial because to do so would potentially disclose an intelligence source and also potentially injure the foreign relations of the United States."); *United States v. Hawamda*, 1989

WL 235836, at *1 (E.D. Va. 1989) ("Disclosure of the contents of the FISA material would harm national security because it would reveal the capabilities and techniques of surveillance, the sources and methods used to counter international terrorism, highly sensitive foreign intelligence information that has been gained, and sought to be gained, the avenues of intelligence gathering that are being pursued, and the identities and locations of the targets of surveillance as well as others who are possibly implicated in wrongdoing and continuing criminal activity."). Given that the Government fully intends to produce that to which the defendant is entitled, his requests for information of this type, beyond that which is required, should be denied.

Furthermore, there is no basis to force the United States Government to press foreign governments (such as the British Government) for intelligence or law enforcement information generated by those governments. Indeed, the defendant has not cited to one case that suggests that the Constitution or any statute imposes such a burden on the Government. Moreover, to create such a rule is "unrealistic" and "would engender hostility between [foreign] and [American]" officials. *Cf. United States v. Paternina-Vergara*, 749 F.2d 993, 998 (2d Cir. 1984) (in case involving joint investigation with foreign government: "the most the Jencks Act requires of United States officials [is] a good-faith effort to obtain the statements of prosecution witnesses in the possession of the foreign government."); *Abdel Rahman*, 870 F. Supp. at 53 (citing damage to foreign relations from disclosure of information from abroad); *United States v. Anglero*, 1993 WL 42775 at *4 (S.D.N.Y.) (rejecting suggestion that federal prosecutor should have personally searched files of Assistant District Attorney for Jencks Act materials), *aff'd*, 9 F.3d 1537 (2d Cir. 1993). Therefore, the defendant's motion should be denied.

Docket #240

In this motion, the defendant asks to be allowed to contact certain European governments to compel them "to disclose publicly their cooperation with the FBI regarding their surveillance of [the defendant] and the 19 hijackers before Sept. 11." The defendant asks that he be allowed to make this contact without the restrictions imposed by the Special Administrative Measures ("SAM") that require all communications with anybody other than counsel of record be monitored and recorded. In this motion, the defendant also asks that standby counsel stop interfering with the delivery of his mail, claiming that he has not received any mail since April 27.

The defendant's motion should be denied. While he remains free to attempt to communicate with officials from foreign governments, the defendant may not communicate with them in violation of the SAM. Nor is there anything unconstitutional about these restrictions, as discussed in the Government's Memorandum of Law in Opposition to the Defendant's Motion for Relief from Prison Conditions. *See United States v. El-Hage*, 213 F.3d 74 (2d Cir.), *cert. denied,* 121 S. Ct. 193 (2000). To the extent the enforcement of the SAM is monitored by government officials who are separated by an ethical firewall from the prosecution team, there is no valid complaint against their enforcement. Thus, consistent with the SAM, the defendant is free to use the telephone. But, he has no claim to relaxing the enforcement of necessary security measures.

As for the defendant's complaints regarding his mail, we are unaware of any mail that standby counsel may be holding for the defendant. We are also unaware, however, of any mail that has been sent to the defendant since April 27.

Docket #241

In this motion, the defendant asks to be able to investigate his case abroad and/or to have "Bro. Freeman" visit him in prison. In support of this motion, the defendant cites: (1) a call he claims to have made to Ibn al-Khattab, the mujahideen commander in Chechnya; (2) the alleged search of his residence after the embassy bombings in East Africa; (3) the purported withholding of information in the possession of foreign governments about the defendant; and (4) that Mr. Freeman already was cleared to visit the defendant in prison.

This motion also should be denied. To the extent the defendant is seeking to travel abroad to investigate the case, the application is frivolous. The Court already has denied the defendant's bail motion, and there is no change in the defendant's circumstances that rebut the overwhelming evidence that the defendant is both a risk of flight and a danger to the community. While the defendant's ability to conduct an investigation may be limited by his *pro se* status, that is a dilemma of his own making and a burden he knowingly and voluntarily accepted during the court proceeding of June 13.

To the extent the defendant is asking that Mr. Freeman act on his behalf, the application already has been denied. Mr. Freeman has not satisfied the requirements of this Court to provide legal advice for the defendant. Thus, the defendant's motion should be denied.

Docket #242

The defendant asks in this motion that the Government "certify that [it] did not conduct any kind of surveillance of [his] apartment in 829 Monnett South, Norman, OK 73071 between [his] entry in the US and [his] arrest on August 16, 2001. The defendant makes a similar demand with respect to the apartment located at "209 Wadsack 1A, Norman."

The Government has complied with its discovery obligations in regard to the Oklahoma residences of the defendant. *See* Response to Motion docketed as #239, *supra*. Therefore, the defendant's motion, to the extent it is not moot, is meritless and should be denied.

Docket #243

In this motion, the defendant demands that the "National Center of Communications" ("NCC") "certify that it did pass, inform the relevant security agency such as FBI and CIA that in Spring/Summer 2000" made two telephone calls from Kandahar to Azerbaijan inquiring about "Masood Al Benin (Djaffa)." The defendant makes similar demands regarding other telephone calls he (in the name "Abu Kaled Sahrawi") alleges to have made in December 1997 from London to "the commander khattab in Chechyen [sic]" and "Shear Abu Omar Safe Mufle in Chechnya."

This motion should be denied for several reasons. First, there is no such entity as the "National Center of Communications." Second, as noted above, the Government has complied with its discovery obligations, thus making the defendant's motion moot, or without merit. Third, also as noted above, there is no basis in law for the Government to issue the certifications demanded by the defendant.

Respectfully Submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
Kenneth M. Karas
David J. Novak
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I certify that on July 1, 2002, a copy of the attached Government's Response to Defendant's Motions was sent by hand delivery, via the United States Marshal's Service to:

Zacarias Moussaoui
Alexandria Detention Center
2001 Mill Road
Alexandria, Virginia 22314

I further certify that on the same day a copy of the attached Government's Response Defendant's Motions was sent by facsimile and regular mail to:

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_/s/_____
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